Zainal Azahar bin Mohd Zain v Pentadbir Tanah Daerah Seberang Perai Utara, Pulau Pinang

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-01(A)-155–04 OF 2016
VERNON ONG, PRASAD ABRAHAM AND KAMARDIN HASHIM JJCA
1 MARCH 2017

Land Law — Acquisition of land — Injurious affection — High Court judge in land reference proceeding under Land Acquisition Act 1960 ('the LAA') refused to consider question of severance and injurious affection because question was not argued before land administrator during proceedings to determine compensation payable — Whether para 2(d) of the First Schedule of the LAA provided that question of injurious affection must be considered — Whether High Court judge should have addressed question during reference proceeding — Whether provisions of the LAA had to be strictly followed as it deprived landowner of his property

The sole issue in this appeal was whether the High Court in a land reference proceeding was right to not address the question of severance and injurious affection following upon the government's compulsory acquisition of a piece of land because that question was not argued before the land administrator ('LA') during proceedings to determine the compensation payable for the acquisition. The appellant and another person were joint owners of land which was wholly acquired by the government under the Land Acquisition Act 1960 ('the LAA') for a public project. The government's assessor gave evidence that there was a pond on the land. The private assessor, however, contended that the property was an abandoned swampland. In reference proceedings to the High Court under the LAA, the judge ruled that it was 'not fair and proper' for the question of severance and injurious affection to be addressed at the reference stage when it had not been argued before the LA. In the instant appeal against that decision, the appellant argued that the valuation reports that were before the LA did raise the question of severance and injurious affection but this was denied by the respondent.

Held, allowing the appeal and remitting the matter back to the High Court judge to consider the question of severance and injurious affection, if any, under the reference proceedings:

(1) The High Court judge erred in law in refusing to consider the question of severance and injurious affection when the matter was referred to the judge by way of reference under the LAA. In a situation where an acquisition exercised on part of a land would have effect on the remaining

and existing land, the issue of injurious affection was relevant. It had to be borne in mind that the constitutional right of the appellant was being taken away by the provisions of the LAA and therefore those provisions had to be strictly adhered to (see paras 4 & 6).

(2) Paragraph 2(d) of the First Schedule of the LAA required 'the damage, if any, sustained or likely to be sustained by the person interested at the time of the land administrator's taking possession of the land by reason of the acquisition injuriously affecting his other property, whether moveable or immovable, in any other manner' to be considered when determining the compensation to be awarded for the acquired land. Paragraph 2(d) clearly provided that the question of severance and injurious affection could be raised (see paras 4–5).

[Bahasa Malaysia summary

Satu-satunya isu dalam rayuan ini adalah sama ada Mahkamah Tinggi dalam prosiding rujukan tanah adalah betul tidak mempertimbangkan soalan pemutusan dan kesan mudarat berikutan pengambilalihan wajib oleh kerajaan terhadap sebidang tanah kerana soalan tersebut tidak dihujahkan di hadapan pentadbir tanah ('PT') semasa prosiding untuk menentukan pampasan yang kena dibayar untuk pemgambilalihan tersebut. Perayu dan seorang yang lain adalah pemilik bersama tanah yang mana secara keseluruhannya diambilalih oleh kerajaan di bawah Akta Pengambilan Tanah 1960 ('APT') bagi projek awam. Penilai kerajaan memberi keterangan bahawa terdapat kolam di atas tanah tersebut. Penilai persendirian, walau bagaimanapun, berhujah bahawa hartanah adalah tanah paya yang terbiar. Dalam prosiding rujukan kepada Mahkamah Tinggi di bawah APT, hakim memutuskan bahawa ia adalah 'not fair and proper' untuk soalan pemutusan dan kesan mudarat dipertimbangkan di peringkat rujukan apabila ia tidak dihujahkan di hadapan PT. Dalam rayuan ini terhadap keputusan tersebut, perayu berhujah bahawa laporan-laporan penilaian di hadapan PT telah membangkitkan soalan pemutusan dan kesan mudarat tetapi ini dinafikan oleh responden.

Diputuskan, membenarkan rayuan dan meremit perkara semula kepada hakim Mahkamah Tinggi untuk mempertimbangan soalan pemutusan dan kesan mudarat, jika ada, di bawah prosiding rujukan:

(1) Hakim Mahkamah Tinggi tersilap dari segi undang-undang dalam menolak untuk mempertimbangkan soalan pemutusan dan kesan mudarat apabila perkara dirujuk kepada hakim melalui rujukan di bawah APT. Dalam keadaan di mana pengambilan dijalankan atas sebahagian tanah yang akan mempunyai kesan ke atas tanah yang tinggal dan sedia ada, isu mengenai kesan mudarat adalah relevan. Ia perlu diambil kira bahawa hak perlembagaan perayu telah diambil oleh peruntukan-peruntukan APT dan oleh itu peruntukan-peruntukan tersebut perlu dipatuhi dengan ketat (lihat perenggan 4 & 6).

(2) Perenggan 2(d) Jadual Pertama APT memerlukan 'the damage, if any, sustained or likely to be sustained by the person interested at the time of the land administrator's taking possession of the land by reason of the acquisition injuriously affecting his other property, whether moveable or immovable, in any other manner' dipertimbangkan apabila menentukan pampasan untuk diawardkan bagi tanah yang diambilalih tersebut. Perenggan 2(d) jelas memperuntukkan bahawa soalan pemutusan dan kesan mudarat boleh dibangkitkan (lihat perenggan 4–5).]

Notes

For cases on injurious affection, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2439–2442.

Cases referred to

Collector of Land Revenue v Looi Lam [1981] 1 MLJ 300, FC (refd)

Legislation referred to

Land Acquisition Act 1960 First Schedule, para 2(d), Form N

Appeal from: Land Reference (LAR) No 15–40 of 2014 (High Court, Pulau Pinang)

Abdul Razak Ismail (Mansor Hashim, Zainal Azahar Mohd Zain and Nurdiana Zainal Azahar with him) (Zainal Azahar & Co) for the appellant.

Siti Fatimah bt Talib (State Legal Advisor, Penang State Legal Advisor's Office) for the respondent.

Prasad Abraham JCA:

INTRODUCTION

[1] This appeal was disposed by us on 24 October 2016 wherein we had allowed the appeal and directed that the matter be sent back to the learned judge to consider the issue of severance and injurious affection under reference proceedings. We append below our grounds for so doing.

FACTS

[2] The facts of the case can be elucidated from the grounds of judgment of the learned High Court judge.

Essentially, Lot 3822 Mukim 03, Daerah Seberang Perai Utara, Pulau Pinang was *gazetted* for acquisition for the purposes of 'Projek Tambahan Ban Merentasi Kolam (Bahagian Kedah dan Pulau Pinang) Pakej 2B Hulu, Projek

Tambatan Banjir Sungai Muda' on 7 November 2013.

One Ng Aik Pang and Zainal Azahar bin Mohd Zain ('the plaintiffs') owned each 1/3 and 2/3 parts of the said lot. The whole 0.3192 hectare of the said lot was acquired fully. The evidence given by the government's assessor showed that the said lot comprised of a pond (1324.146mp) and the remainder was land. However, the private assessor on the other hand painted a picture that the land was an abandoned swampland.

OUR DECISION

[3] The only issue that was raised in this appeal which drew considerable interest was the point that the question of severance and injurious affection was only raised in reference proceedings before the learned judge through 'Borang N' pursuant to the Land Acquisition Act 1960 ('the LAA') (Act 486). The learned judge ruled that as the question of severance and injurious affection was not raised and argued before the *pentadbir tanah*, it would not be fair and proper to consider injurious affection at the stage of reference at the High Court (see pp 30–31 of the grounds of judgment, *rekod rayuan Jld* 1). The appellant in this case argue that the valuation reports had placed the question of severance and injurious affection before the *pentadbir tanah*. The respondent denies that.

[4] We are of the view that in a situation where an acquisition exercised of part of a land would have effect on the remaining and existing land then the issue of injurious affection would be relevant. It must be borne in mind that the constitutional rights of the respondent was being taken away by the provisions of the LAA and therefore those provisions must be strictly adhered to. We refer to the First Schedule *of the Act, and in particular para 2(d)* and we quote:

> *Matters to be considered in determining compensation*
>
> 2. In determining the amount of compensation to be awarded for any scheduled land acquired under this Act there shall be taken into consideration the following matters and no others:
>
> (a) the market value as determined in accordance with section 1 of this Schedule;
>
> (b) any increase, which shall be deducted from the total compensation, in the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put;
>
> (c) the damage, if any, sustained or likely to be sustained by the person interested at the time of the Land Administrator's taking possession of the land by reason of severing such land from his other land;
>
> (d) *the damage, if any, sustained or likely to be sustained by the person interested*

at the time of the Land Administrator's taking possession of the land by reason of the acquisition injuriously affecting his other property, whether movable or immovable, in any other manner;

(e) if, in consequence of the acquisition, he is or will be compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change; and

(f) where only part of the land is to be acquired, any undertaking by the State Authority, or by the Government, person or corporation on whose behalf the land is to be acquired, for the construction or erection of roads, drains, walls, fences or other facilities benefiting any part of the land left unacquired, provided that the undertaking is clear and enforceable. (Emphasis added.)

[5] We are of the view that para 2(d) clearly provides that the question for severance and injurious affection can be raised. The only issue for us to consider now is whether the High Court at a reference stage can consider the question of severance and injurious affection. We refer to the decision of the Federal Court in *Collector of Land Revenue v Looi Lam* [1981] 1 MLJ 300 where it was held:

As paragraph 2(d) of the First Schedule to the Land Acquisition Act 1960, refers to the damage 'likely to be sustained' by the person interested, the damages for injurious affection to the house in this case could be claimed and was rightly awarded in the course of a reference to the High Court under the Act.

We also refer to the judgment of His Lordship Suffian LP (as he then was) and we quote p 302 para E–G:

To allow the owner to pursue her claim in the course of the reference which was not heard until May 30, 1978, ie nearly eight years after the completion of the river deviation work on December 12, 1970, was, Datuk Mansor argued, unfair to Government; because by then any suit by the owner would certainly have been time-barred under the Public Authorities Protection Ordinance 1948, which prescribed a one-year time limit, and allowing consideration of this claim in the course of the reference was tantamount to reviving a time-barred cause of action. What the owner should have done, it was submitted, was to sue Government separately for this damage.

With respect we do not agree. In our judgment the learned judge was right in ruling that the owner need not have sued separately for this damage and that the court has power to consider and adjudicate on her claim in the course of the reference. With respect we agree with the law stated by the Calcutta Court in *RH Wernicke v The Secretary of State for India in Council*.

There Government acquired part of a tea garden for the purpose of extending a rifle range near Darjeeling. The owners were left with about eight acres of tea land behind the butts where it was extremely unsafe to work when firing was going on. They claimed injurious affection of these eight acres. Counsel for Government opposed the claim, arguing that any damage should be the subject of a suit.

Richardson J at pp 1059–1060 disposed of this argument as follows: A

> There remains the claim for injurious affection which is laid as Rs 2,540. It is said that the rifle range will interfere, with the working of eight acres of land behind the butts and I think that there can be no doubt as to this. It will not be safe to put coolies on the land when the range is being used. Mr Sinha for the Government contended that the contemplated injury was contingent, that it could only arise from the negligent use of the range and that the tea garden was not entitled to compensation now but would be entitled to a remedy by suit when the injury occurred. The case to which he referred *His Highness the Gaekwar of Baroda v Gandhi Kachrabhai Kasturchand* is not an adequate support for this proposition and the learned counsel for the claimants cited good authority for the view that the tea garden is entitled to compensation now even if the injury which is contemplated be of the nature of an actionable nuisance (Land Acquisition Act, s 23, clause fourthly) *Croft v L & NW Ry Co* and *Cowper Essex v The Local Board of Acton*. B C

As to Datuk Mansor's argument that to allow consideration of the owner's claim in the course of reference was tantamount to reviving a time-barred claim, it cannot be said that the owner has been guilty of delay at all. The collector made his award on January 30, 1970; and the owner promptly by Form N asked for her objection to be referred to the High Court. This form, be it noted, was dated March 4, 1970, one month and a few days later and certainly well within the one-year limit prescribed by the Protection of Public Authorities Ordinance 1948. Moreover, as can be seen from this Form at p 28 of the appeal record, the owner specifically gave notice that she intended to make a claim under para 2(d) of the First Schedule. D E

An additional reason for holding that the owner's claim under this paragraph may be considered in the course of the reference is the absence from the Land Acquisition Act 1960, of a section corresponding to s 31 of the FMS Land Acquisition Enactment (FMS Cap 140) which provided that when an owner had made a claim to the collector, the High Court in a reference might not award a sum exceeding the sum so claimed: this implies that the Legislature when enacting the Act desired to let the High Court have in a proper case a free hand to award more than the sum claimed before the collector. What case can be more proper than this one where at the time of enquiry there was only the possibility of damage and soon after the completion of the river deviation work there was indeed damage and extensive damage at that? F G

Finally, it is in the public interest that as many related matters in controversy as possible should be ventilated and determined in the same proceedings- to save time and costs. (Emphasis added.) H

[6] We are therefore of the view the learned judge erred in law in refusing to consider the question of severance and injurious affection at the stage when the matter was referred to the learned judge by way of reference under the LAA. I

[7] In the light of the aforesaid we feel the most appropriate order under this circumstances would be to allow this appeal and remit the matter back to the

learned judge to consider solely the question of severance and injurious affection (if any) as part of the proceedings before the learned judge and we so order.

Appeal allowed.

Reported by Ashok Kumar